Supreme Court, U.S.
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No. 98-1656

IN THE

Supreme Court of the United States

WILLIAM E. CUTRIGHT,

Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, d/b/a "METLIFE", MICHAEL A. SCHLEGEL and WILLIAM THOMAS,

Respondents.

On Petition for a Writ of Certiorari to the West Virginia Supreme Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant certiorari to decide if plaintiff's Due Process rights were violated by a supposed inconsistency between two decisions of the same state court when: (a) he failed to preserve the Due Process issue below; (b) due to the procedural posture of this case, the Due Process issue plaintiff described in his Question Presented is not properly before this Court; (c) the argument he seeks to raise is barred by *res judicata* or collateral estoppel, since he asserted the same theory in a separate federal lawsuit (a proceeding he omitted to disclose in his Petition); and (d) the alleged "inconsistency" consists of the state court's dual determinations that plaintiff is entitled to unemployment benefits, but is not entitled to punitive or compensatory damages for wrongful discharge?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Metropolitan Life Insurance Company, has no parent company and does not issue stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
A. Factual Background	1
B. Nature Of Plaintiff's Claims	2
C. Procedural History	2
D. Details re: The Order From Which Plaintiff Seeks Certiorari	4
Reasons for Denying the Writ	6
I. The Due Process Issue Plaintiff Seeks To Raise Was Not Preserved Below	6
II. The Due Process Issue Described in Plaintiff's "Question Presented" Is Not Properly Before This Court	7
III. The Argument Plaintiff Seeks To Make Here Is Barred By Res Judicata Or Collateral Estoppel	8

Contents

Page

IV. There Is No "Inconsistency" Between The State Court's Two Decisions, Let Alone One That Rises To The Level Of A Due Process Violation 9

A. Details re: The Decision In The *Unemployment* Case 10

B. Legal Analysis 11

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Cutright v. McNeer, Highland, McMunn & Varner, L.C., No. 98-C-251-1 (Harrison Cty., W. Va.) 3

Metropolitan Life Ins. Co. v. Gatson, 490 S.E.2d 743 (W. Va. 1997) 3, 6, 8, 9, 10, 11

Page v. Columbia Natural Resources, Inc., 480 S.E.2d 817 (1996) 12

Pichon v. Pacific Gas & Elec. Co., 260 Cal. Rptr. 677 (Cal. App. 1989) 12

Slack v. Kanawha County Housing and Redevelopment Authority, 423 S.E.2d 547 (1992) 12

White River Lumber Co. v. State of Arkansas, 279 U.S. 692 (1929) 7

Willy v. Coastal Corp., 503 U.S. 131 (1992) 9

Cited Authorities

Page

Statutes:

42 U.S.C. § 1983 4

42 U.S.C. § 2000 *et seq.* 2

Ohio Revised Code § 4141.28(R) 12

W. Va. Code 33-12A 2

Rules:

Fed. R. Civ. P. 11 4

W. Va. R. Civ. P. 60(b) 3, 4, 6, 7

STATEMENT OF THE CASE

A. Factual Background

Plaintiff was employed as an insurance agent for defendant, Metropolitan Life Insurance Company ("MetLife"). In 1994, he was fired for a combination of two offenses: unprofessional conduct and insubordination.

Unprofessional Conduct: Plaintiff was abusive to female clerical employees. He "repeatedly yelled at the women, often adding profanity. . . . [H]e 'cursed and yelled and threw things.' " *Cutright v. Metropolitan Life Ins. Co., et al.*, 491 S.E.2d 308, 310 (W. Va. 1997). Several women complained, and MetLife warned him to stop, but the warning had "little or no effect." *Cutright*, 491 S.E.2d at 311. Less than one month later, "another incident involving crass, hostile behavior and the use of profanity occurred." *Cutright*, 491 S.E.2d at 311 (he called one clerical employee a "fat ass bitch," and said others were "f_ _ _ing nuts"). *Cutright*, 491 S.E.2d at 311. Plaintiff's conduct created a "workplace permeated with discriminatory intimidation [and] ridicule of the three female clerical employees." *Cutright*, 491 S.E.2d at 316.

Insubordination: Around the same time, plaintiff was directly ordered by his superiors, defendants Thomas and Schlegel, to stop granting a non-employee "full access to [MetLife's] computer system." *Cutright*, 491 S.E.2d at 311. He replied, in writing, that he would not follow that order "until he received notice from the legal department." *Cutright*, 491 S.E.2d at 311.

B. Nature Of Plaintiff's Claims

In one lawsuit, plaintiff filed a routine claim for unemployment benefits. In a separate state court lawsuit, he pursued a wrongful discharge claim, seeking punitive and compensatory damages. Specifically, he claimed he was terminated in violation of W. Va. Code 33-12A. This statute, which only applies to a subset of insurance agents, narrowly limits the reasons for discharge to six specified grounds. As construed by West Virginia's highest court, it prohibits some insurance agents from being fired for abusing and harassing co-workers, even if their behavior is so eggregious that it violates laws against sexual harassment, because such conduct "does not fit one of the six listed grounds for discharge." *Cutright*, 491 S.E.2d at 316. Finally, plaintiff filed a third lawsuit, in federal court, in which he tried to collaterally attack the state court's judgment.

C. Procedural History

Wrongful Discharge Claim — Round One: Petitioner ("plaintiff") filed suit in state court seeking to recover damages under W.Va. Code 33-12A. A jury awarded him $1 million, but the West Virginia Supreme Court of Appeals reversed and entered judgment for defendants. It held that the state statute is pre-empted under the Supremacy Clause because it conflicts with Title VII, 42 U.S.C. § 2000 *et seq.* *Cutright*, 491 S.E.2d 308 (henceforth, "*Cutright I*"). Plaintiff did *not* seek a writ of certiorari to review *that* decision.

The Unemployment Case: Four days after issuing its decision in *Cutright I*, the West Virginia Supreme Court of Appeals affirmed plaintiff's entitlement to unemployment

benefits. *Metropolitan Life Ins. Co. v. Gatson*, 490 S.E.2d 743 (W. Va. 1997) (henceforth, the "*Unemployment Case*"). This did *not* prompt him to petition for a writ of certiorari to review the supposed inconsistency.

Wrongful Discharge Claim — Round Two: In August 1997, plaintiff filed a motion for rehearing in the West Virginia Supreme Court of Appeals. He argued that the Court's two decisions conflict with each other, so it should vacate its decision in *Cutright I*. The court denied his motion. (Order dated Sept. 3, 1997). Plaintiff did *not* seek a writ of certiorari to review that decision — and the deadline for doing so expired a year ago.

* * *

Instead of giving up, plaintiff fired the attorney who had been representing him and sued that gentleman for malpractice. *Cutright v. McNeer, Highland, McMunn & Varner, L.C.*, No. 98-C-251-1 (Harrison Cty., W. Va.). His new lawyer tried to re-litigate the issues plaintiff had lost, simultaneously pursuing two collateral attacks (one in state court, the other in federal court).

Wrongful Discharge Claim — Round Three: Plaintiff and his new lawyer went back to the West Virginia circuit court (i.e., trial court) and filed a motion, under Rule 60(b), for relief from judgment. He expressly asked the circuit court to overrule its own Supreme Court of Appeals; i.e., to declare the higher court's decision "a nullity." His motion was denied. (Order dated April 21, 1998) (Appendix B to the Petition).

The Federal Lawsuit: Plaintiff went forum shopping and filed a new lawsuit in federal court. *Cutright v. Metropolitan Life Ins. Co.*, No. 1: 98CV23 (N.D. W. Va. 1998) (henceforth, "*Cutright II*"). He asserted that there is a "conflict between the two decisions" issued by the Supreme Court of Appeals (Plaintiff's Response To Defendants' Motion To Dismiss, p. 6) — the same argument he seeks to raise in the present Petition, and the same one he unsuccessfully raised in his motion for rehearing in the Supreme Court of Appeals. Then he claimed that the supposed inconsistency violates the Due Process Clause, the Equal Protection Clause, and/or 42 U.S.C. § 1983. The district court dismissed plaintiff's lawsuit for failure to state a claim.[1] (Order dated Sept. 11, 1998). Plaintiff did *not* appeal this final judgment to the Fourth Circuit.

Wrongful Discharge Claim — Round Four: Plaintiff tried to go back to the Supreme Court of Appeals yet again. He filed a Petition To Appeal (the West Virginia equivalent of a certiorari petition), requesting discretionary review of the circuit court's denial of his Rule 60(b) motion. The Supreme Court of Appeals denied his petition. (Order dated October 29, 1998) (Appendix D to Certiorari Petition). *This* order is the order plaintiff now asks the United States Supreme Court to review.

D. Details re: The Order From Which Plaintiff Seeks Certiorari

When the circuit court denied plaintiff's Rule 60(b) motion, it never ruled on the merits of his argument (i.e.,

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1. The district court also seriously considered a Rule 11 motion and held oral argument on this subject, but ultimately decided not to impose sanctions.

do the state Supreme Court's two decisions conflict with each other?). Rather, it held that a circuit court "lacks jurisdiction," and "does not have the authority," to "vacate and void a final judgment of the West Virginia Supreme Court," whether or not the lower court agrees with higher court's decision. (4/21/98 Order).

This question about how authority is divided among state courts — whether a circuit court can nullify a higher court's decision — is the one West Virginia's Supreme Court of Appeals declined to hear. Indeed, when plaintiff filed his Petition To Appeal, that was the issue he asked the Court to consider. His pertinent assignments of error were as follows[2]:

> 1. The trial court erred in refusing to rule that the West Virginia Supreme Court's opinion in Case No. 23884 [is] null and void.
>
> * * *
>
> 3. The trial court erred in determining that it lacked jurisdiction to vacate and void a judgment of the West Virginia Supreme Court of Appeals.

(Petition To Appeal, p. 6).

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2. Assignment No. 2, omitted from the quotation in the text, asserted that the trial court erred when it allowed MetLife to amend its answer.

REASONS FOR DENYING THE WRIT

I. The Due Process Issue Plaintiff Seeks To Raise Was Not Preserved Below

When plaintiff filed his Rule 60(b) motion in the circuit court, he did not mention the Due Process Clause, nor any constitutional concerns. His motion asserted four (4) specific grounds for granting relief from judgment, which he framed as follows:

> "The grounds for plaintiff's motion requesting that the jury verdict be reinstated and that the order reversing the judgment herein be declared null and void are:
>
> A. The opinion of the West Virginia Supreme Court of Appeals in [the *Unemployment Case*] renders the Supreme Court's opinion in [*Cutright I*] null and void;
>
> B. The defendants' claims before this Court and the West Virginia Supreme Court of Appeals that the plaintiff was discharged for violations of Title VII of the 1964 Civil Rights Act was precluded by the failure to raise the issue in its pleadings and by their answer admitting the plaintiff was discharged for unprofessional conduct and insubordination.
>
> C. The defendants' claim before this Court and the West Virginia Supreme Court of Appeals that plaintiff was discharged for violations

> of Title VII of the 1964 Civil Rights Act [sic] was precluded by the decision of the West Virginia Supreme Court in the *Unemployment Case*.
>
> D. The defendants' filing of an Amended Answer without first obtaining leave of Court as required by Rule 15(a) of the West Virginia Rules of Civil Procedure constitutes a fraud upon the Court thereby nullifying any judgment based upon the constitutionality of West Virginia Code § 33-12A-1, *et seq.*"

(Appendix A to Certiorari Petition). Likewise, in his Petition To Appeal, plaintiff did not contend that his constitutional rights had been violated. He argued only that the "trial court erred" in denying his Rule 60(b) motion. (Supra, p. 5) (quoting plaintiff's Petition To Appeal).

This alone is sufficient grounds to deny the present certiorari petition. *See White River Lumber Co. v. State of Arkansas*, 279 U.S. 692, 700 (1929) (an issue is "necessarily excluded from our consideration" if it was not "presented in or passed upon" by the state Supreme Court).

II. The Due Process Issue Described In Plaintiff's "Question Presented" Is Not Properly Before This Court

Due to this case's procedural posture, the only issue that could properly be reviewed by this Court at the present time is:

> Did the West Virginia Supreme Court of Appeals err by exercising its discretion not to hear an appeal when the issue presented by the appeal would have been: can a state circuit court nullify the state Supreme Court's decisions?

Plaintiff did not seek a writ of certiorari in 1997, when the Supreme Court of Appeals issued its decisions in *Cutright I* and the *Unemployment Case*. Nor did he seek a writ of certiorari later in 1997, when the same court denied his motion for rehearing in *Cutright I* (in which he asserted that its two decisions conflict). The time for seeking a writ to review either of *those* two decisions expired long ago.

III. The Argument Plaintiff Seeks To Make Here Is Barred By Res Judicata Or Collateral Estoppel

In a separate federal lawsuit, *Cutright II*, plaintiff made the same argument he seeks to re-litigate here. He asserted that his Due Process rights had been violated, and that the Supreme Court of Appeals did something improper by issuing two conflicting decisions. The following is an excerpt from a brief he filed in *Cutright II*:

> [T]he West Virginia Supreme Court rendered two separate opinions regarding Mr. Cutright's employment relationship with Metropolitan. . . . Quite simply, how can Title VII preempt the just cause provisions of *West Virginia Code* § 33-12A-3 and not the misconduct disqualification of *West Virginia Code* § 21A-6-3 [unemployment benefits] when the same conduct is at issue? * * * The real enigma in this case is that [the Supreme Court of Appeals] had

> the same set of facts before it in two separate cases and reached different results. . . . [There is] a conflict between the two decisions. . . .

(Cutright's Response To Defendants' Motion To Dismiss in *Cutright II*, pp. 5-6).

The federal district court entered a final judgment against plaintiff, and he did not appeal that decision. In such circumstances, the doctrines of *res judicata* and/or collateral estoppel preclude him from re-litigating the same issue in the present proceeding. *See Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992) (even if the district court lacked subject matter jurisdiction, a judgment it rendered while under the "misapprehension that it had jurisdiction" still is entitled to *res judicata* effect and cannot be attacked in a "collateral" proceeding).

IV. There Is No "Inconsistency" Between The State Court's Two Decisions, Let Alone One That Rises To The Level Of A Due Process Violation

Plaintiff argues that if Title VII does not preclude him from receiving unemployment benefits, then it cannot preempt an award of punitive and compensatory damages under West Virginia's wrongful discharge statute. Conversely, he asserts, if his conduct qualified as sexual harassment within the meaning of Title VII, then it must also qualify as "misconduct" under the unemployment compensation statute, which would disqualify him from receiving benefits. In either event, he concludes, this is a "both or neither" situation: there is no way the state court could properly permit recovery in the *Unemployment Case* but reverse his award in *Cutright I*. He then insists, without

any pertinent authority, that this supposed inconsistency rises to the level of a Due Process violation. His theory is meritless because: (a) the state court's decisions are not inconsistent; and (b) even if they were, there still would not be a Due Process violation.

A. Details re: The Decision In The *Unemployment Case*

The Supreme Court of Appeals explained that its decision in the *Unemployment Case* was limited by two factors. First, in that case, MetLife **waived** any argument that plaintiff's harassment of female co-workers disqualified him from receiving unemployment benefits:

> [T]he facts relevant to this appeal are limited to the question of Mr. Cutright's alleged insubordination. * * * [During the administrative hearing,] Metropolitan also alleged that Mr. Cutright engaged in conduct unbecoming one of its sales representatives [i.e., harassing female clericals]. . . . [However,] in its appeal to the circuit court, Metropolitan did not appeal the Board of Review's rejection of the unbecoming conduct discharge argument. Because the unbecoming conduct issue is not before this Court in this appeal, [that] issue is not considered in this appeal.

Unemployment Case, 490 S.E.2d at 745, 746 n.4.

Second, judicial review of an administrative agency's decision to award unemployment benefits is very narrow. This is due to "remedial nature" and "benign purposes" of

the unemployment compensation statute, and because the agency's decision is "entitled to substantial deference" (it can be reversed only if "clearly wrong"). *Unemployment Case*, 490 S.E.2d at 744.

Applying these rules, the court affirmed the Review Board's finding that plaintiff's insubordinate behavior did not disquality him from receiving unemployment benefits.

B. Legal Analysis

Since MetLife *waived* the sexual harassment and Title VII preemption arguments in one case, but not in the other, there is nothing inconsistent about the state *court's* decisions. The Supreme Court of Appeals properly considered the sexual harassment and preemption issues only in the lawsuit where a party raised it.

Further, holding that the wrongful discharge statute is preempted, but the unemployment compensation statute is not, is the correct result. The wrongful discharge statute made it *unlawful* to fire an insurance agent for sexual harassment, no matter how flagrantly he harassed co-workers or how many warnings he ignored. It also imposed punitive and compensatory damages on any employer who violated this state law. Such a state statute clearly interfered with Title VII's goals, and/or with an employer's ability to comply with Title VII. Requiring an employer to pay unemployment benefits when it terminates an agent for sexual harassment is not remotely comparable. The magnitude of the exposure is far less, *and* the employer is not stigmatized as a lawbreaker (the award merely reflects a policy decision to have a safety net for people who lose their jobs). Thus, the unemployment statute does not interfere with Title VII.

Finally, even assuming *arguendo* that the two decisions were somewhat "inconsistent," there still would be no Due Process violation. Plaintiff concedes that "*ordinarily*, erroneous or conflicting decisions rendered by the highest court of a State is *not* a denial of due process." (Petition For Certiorari, p. 10) (emphasis added). Only in an extraordinary case would such an inconsistency rise to the level of a constitutional violation. This is not such a case, because there was nothing "arbitrary" about what occurred here.

Based on public policy considerations, West Virginia long ago concluded that it is not important for the outcome in an unemployment benefits case to be "consistent" with the decision in a wrongful discharge or discrimination lawsuit. Thus, West Virginia *always* declines to give the decision in an unemployment case any *res judicata* or collateral estoppel effect in other civil actions. E.g., *Page v. Columbia Natural Resources, Inc.*, 480 S.E.2d 817, 832 (1996); *Slack v. Kanawha County Housing and Redevelopment Authority*, 423 S.E.2d 547, 558 (1992). Many states, including California and Ohio, have reached the same policy conclusion; they, too, deny preclusive effect to findings made in unemployment cases. *E.g.*, *Pichon v. Pacific Gas & Elec. Co.*, 260 Cal. Rptr. 677, 687-88 (Cal. App. 1989) (state statute prohibits courts from giving preclusive effect to any determination made in an unemployment case); *Ohio Revised Code* § 4141.28(R) (same).

CONCLUSION

For all of the preceding reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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